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THE LIABILITY OF AN AGENT TO THIRD PERSONS IN TORT

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§ 1. IN GENERAL.—The question of the liability of the agent to third persons in tort cases involves very different considerations from those which govern his liability upon contracts. In the contract case the question whether any contract at all shall be made is one which the parties may determine for themselves, and if they decide to make a contract, they may determine with whom it shall be made. They have the power to determine in advance who shall be the party to be bound by the contract, and may so shape the contract as to impose its liabilities upon the party so selected.

In the case of the tort, the situation is ordinarily entirely different. The question of whether a tort shall be committed has not been left to the determination of the injured party; he has had no opportunity nor power to determine by whom the tort shall be committed; the situation lacks every element of consent and is the result of the unauthorized and unlawful breaking in of one person upon the rights or security of another.

§ 2. AGENCY USUALLY NO DEFENSE IN TORT CASES.—It is sometimes said that "in torts the relation of principal and agent does not exist. They are all wrong-doers and the liability of each and all does not cease until payment has been made or satisfaction rendered or something equivalent thereto."¹ While this statement undoubtedly requires some qualification, it is, nevertheless, declaratory of a more or less general principle, and it is, as

¹ See *Berghoff v. McDonald*, 87 Ind., 549; *Carraher v. Allen*, 112 Ia., 168, 83 N. W., 902.

will be seen, in many cases true that the fact that the wrongdoer purported to do the act as agent for another is entirely immaterial so far as his own liability is concerned. That fact may make the alleged principal liable also, but it will in many cases have no tendency to exonerate the alleged agent.

§ 3. AGENT LIABLE FOR NEGLIGENT ACTS OUTSIDE THE SCOPE OF HIS AGENCY.—Before taking up the more difficult questions, certain simple cases may be disposed of, concerning which there could not well be any difference of opinion. Thus, if an agent, while doing an act which has some relation to his agency, but is really beyond the scope of it, wilfully or negligently injures a third person, he would undoubtedly be personally liable to the person injured. In such a case, the reputed principal would not be liable and the agent would be the real principal. Thus, for example, if a servant or agent, acting entirely outside the scope of his employment, should take his master's horse and wagon and go off upon a frolic of his own and in doing so should wilfully or negligently so manage the horse and wagon as to cause injury to a third person, the servant or agent would undoubtedly be personally liable.

§ 4. LIABILITY OF AGENT FOR TRESPASS.—It is in general true that every person who does an act which invades or violates the right of property or security of another, does so at the peril of being able to furnish legal justification for his act, if he be called upon legally to account for it. Such a justification cannot be found either in the general or the specific command or direction of one who had no legal right to command or direct that the act be done. It is therefore the general rule that an agent who trespasses upon the person or property of another is liable to the person so injured and the fact of his agency furnishes no excuse.²

² A surveyor is personally liable for a trespass committed by him, though the act was done in behalf and under the direction of a highway board by which he was employed. *Mill v. Hawker*, L. R., 10 Ex., 92. To same effect, *Smith v. Colby*, 67 Me., 169.

An agent who fences in a portion of the highway is liable for an injury caused thereby, though he does it for and under the direction of his principal, a railway company. *Blue v. Briggs*, 12 Ind. App., 105, 39 N. E., 885.

An agent who commits an assault on a third person is personally liable even though he did it in the principal's interest and for the protection of his property. *New Ellerslie Fishing Club v. Stewart*, 123 Ky., 8, 93 S. W., 598; *Canfield v. Chicago, etc., Ry. Co.*, 59 Mo. App., 354.

§ 5. SAME SUBJECT—PRINCIPAL'S KNOWLEDGE OR DIRECTION NO DEFENSE.—It does not relieve the agent that the wrong was committed with the knowledge of the principal, or by his consent or express direction,³ because no one can lawfully authorize or direct the commission of a wrong. *A fortiori*, it is no defense that the agent in committing the wrong violated his instructions from his principal.⁴ Neither is it material that the agent derives no personal advantage from the wrong done.⁵ The fact that the agent acted in good faith, supposing the principal had a legal right to have done what was done, is no defense. He who intermeddles with property not his own must see to it that he is protected by the authority of one who is himself, by ownership or otherwise, clothed with the authority he attempts to confer.⁶

§ 6. LIABILITY OF AGENT FOR CONVERSION.—In accordance with the principles of the preceding section, it is generally held that an agent who, for his principal, takes, sells or otherwise disposes of, the goods or chattels of another, without legal justification, is personally liable even though he acted in good faith, sup-

An agent who, while acting for his principal, sues out an attachment against the plaintiff's property without reasonable cause for believing that the statements, upon which it was obtained, were true, may be held liable for the malicious prosecution. *Carraher v. Allen*, 112 Ia., 168, 83 N. W., 902.

An agent who, without justification, though acting for his principal, caused a distress for rent to be made, is personally liable. *Bennett v. Bayes*, 5 H. & N., 391.

See also, *Hazen v. Wight*, 87 Me., 233, 32 Atl., 887; *Welsh v. Stewart*, 31 Mo. App., 376; *Horner v. Lawrence*, 37 N. J. L., 46; *Baker v. Davis*, 127 Ga., 649, 57 S. E., 62; *Burns v. Horkan*, 126 Ga., 161, 54 S. E., 946.

³ *Weber v. Weber*, 47 Mich., 569, 11 N. W., 389; *Lee v. Mathews*, 10 Ala., 682, 44 Am. Dec., 498; *Baker v. Wasson*, 53 Tex., 157; *Johnson v. Barber*, 5 Gil. (Ill.), 425, 50 Am. Dec., 416.

⁴ *Starkweather v. Benjamin*, 32 Mich., 306; *Johnson v. Barber*, *supra*.

⁵ *Weber v. Weber*, *supra*.

⁶ *Spraghts v. Hawley*, 39 N. Y., 441, 100 Am. Dec., 452; *Kimball v. Billings*, 55 Me., 147, 92 Am. Dec., 581; *Everett v. Coffin*, 6 Wend. (N. Y.), 609, 22 Am. Dec., 551; *Williams v. Merle*, 11 Wend. (N. Y.), 80, 25 Am. Dec., 604.

posing the goods to be his principal's⁷ and although he may have delivered the goods taken to his principal.⁸

⁷ *Lee v. Matthews*, 10 Ala., 682, 44 Am. Dec., 498; *Perminster v. Kelly*, 18 Ala., 716, 54 Am. Dec., 177; *Merchants & Planters' Bank v. Meyer*, 56 Ark., 499, 20 S. W., 406; *Swim v. Wilson*, 90 Cal., 126, 27 Pac., 33, 25 Am. St. R., 110, 13 L. R. A., 605; *Berghoff v. McDonald*, 87 Ind., 549; *Warder, etc., Co. v. Harris*, 81 Iowa, 153, 46 N. W., 859; *Kimball v. Billings*, 55 Me., 147, 92 Am. Dec., 581; *McPheters v. Page*, 83 Me., 234, 22 Atl., 101, 23 Am. St. Rep., 772; *Wing v. Milliken*, 91 Me., 387, 40 Atl., 138; *Milliken v. Hathaway*, 148 Mass., 69, 19 N. E., 16, 1 L. R. A., 510; *Coles v. Clark*, 3 Cush. (Mass.), 399; *McPartland v. Read*, 11 Allen (Mass.), 231; *Edgerly v. Whalan*, 106 Mass., 307; *Robinson v. Bird*, 158 Mass., 357, 33 N. E., 391, 35 Am. St., 495; *Kearney v. Clutton*, 101 Mich., 106, 59 N. W., 419, 45 Am. St., 394; *Koch v. Branch*, 44 Mo., 542; *Arkansas City Bank v. Cassidy*, 71 Mo. App., 186; *Mohr v. Langan*, 162 Mo., 474, 63 S. W., 409; *Gage v. Whittier*, 17 N. H., 312; *Sprights v. Hawley*, 39 N. Y., 441, 100 Am. Dec., 452; *Thorpe v. Burling*, 11 Johns. (N. Y.), 285; *Farrar v. Chaufetete*, 5 Den. (N. Y.), 527; *Everett v. Coffin*, 6 Wend. (N. Y.), 603, 22 Am. Dec., 551; *Spencer v. Blackman*, 9 Wend. (N. Y.), 167; *Williams v. Merle*, 11 Wend. (N. Y.), 80, 25 Am. Dec., 604; *Fowler v. Hollins*, L. R. 7, Q. B., 616; *Perkins v. Smith*, 1 Wils., 328; *Stephens v. Elwall*, 4 Maule & Sel. 259; *McCombie v. Davies*, 6 East, 538; *Baldwin v. Cole*, 6 Mod., 212; *Pierson v. Graham*, 33 Eng. C. L., 468.

Contra: See *Frizzell v. Rundle*, 88 Tenn., 396, 12 S. W., 918, 17 Am. St., 908; *Roach v. Turk*, 9 Heisk. (Tenn.), 708, 24 Am. Rep., 360.

The Minnesota court has also, in *Leuthold v. Fairchild*, 35 Minn., 99, 27 N. W., 503, 28 *idem*, 218, laid down doctrines which cannot be reconciled with the preceding cases. See this case distinguished in *Dolliff v. Robbins*, 83 Minn., 498, 86 N. W., 772, 85 Am. St., 466.

See also *McLennan v. Leman*, 57 Minn., 317, 59 N. W., 628.

⁸ *Miller v. Wilson*, 98 Ga., 567, 25 S. E., 578, 58 Am. St., 319; *Edgerly v. Whalan*, 106 Mass., 307; *Lee v. Mathews*, 10 Ala., 682, 44 Am. Dec., 498; *Kimball v. Billings*, 55 Me., 147, 92 Am. Dec., 581; *Sprights v. Hawley*, 39 N. Y., 441, 100 Am. Dec., 452; *Thorpe v. Burling*, 11 Johns. (N. Y.), 285; *Williams v. Merle*, 11 Wend. (N. Y.), 80, 25 Am. Dec., 604; *Perkins v. Smith*, 1 Wils., 328; *Stephens v. Elwall*, 4 Maule & Sel., 259.

A sewing machine agent who takes from a married woman a machine and some money, both belonging to her husband, in exchange for a new machine, and turns over the old machine to his company, is guilty of conversion of the machine, and is liable to the husband in damages. No demand for the return of the old machine is necessary. *Rice v. Yocum*, 155 Pa., 538, 26 Atl., 698.

The essence of the conversion lies in the fact that the agent has done or participated in doing some act which denies, repudiates, or destroys the true owner's title and right to possession, as where he sells, delivers or otherwise disposes of the property in such a way as to cut off or impede the owner's right: *Swim v. Wilson*, 90 Cal., 126, 27 Pac., 33, 25 Am. St. R., 110, 13 L. R. A., 605; *Porter v. Thomas*, 23 Ga., 467; *Cassidy Bros. v. Elk Grove Cattle Co.*, 58 Ill. App., 39; *Fort v. Wells*, 14 Ind. App.,

Where the conversion charged against the agent consists of the fact that he has refused to surrender, upon demand by one who is really the rightful owner and entitled to possession, goods which were delivered to him by his principal to be held for the latter, somewhat different considerations apply. A mere refusal to surrender is not necessarily a conversion; it may be open to explanation. "Thus," it is said in one case,⁹ "it is no conversion for the bailee of a chattel, who has received it in good faith from some person other than the owner, to refuse to deliver it to the owner making demand for it until he has had time to satisfy himself in regard to the ownership."¹⁰ In the case of a servant who has re-

531, 43 N. E., 155; *Shearer v. Evans*, 89 Ind., 400; *Kearney v. Clutton*, 101 Mich., 106, 59 N. W., 419, 45 Am. St. R., 394; *Lafayette Co. Bk. v. Metcalf*, 40 Mo. App., 494; *Stevenson v. Valentine*, 27 Neb., 338, 43 N. W., 107; *Bercich v. Marye*, 9 Nev., 312; *Hoffman v. Carow*, 20 Wend. (N. Y.), 21; *Iredale v. Kendall*, 40 L. T. N. S., 362; *London*, 17 Q. B. Div., 705; *Consolidated Co. v. Curtis* (1892), 1 Q. B. Div., 495; *Barker v. Furlong* [1891], 2 Ch. Div., 172; *Perkins v. Smith*, 1 Wils., 328; *Pearson v. Graham*, 6 Ad. & El., 899; *Ewhank v. Nutting*, 7 C. B., 797; *Ganly v. Ledwidge*, 10 Irish Rep. C. L., 33; *Cranch v. White*, 1 Bing. N. C., 414, 6 Car. & Payne, 767.

But this rule is held not to apply where an agent in good faith and without negligence takes by delivery negotiable instruments and transfers them again by delivery, paying the proceeds to his principal and deriving no profit himself. *Spooner v. Holmes*, 102 Mass., 503, 3 Am. Rep., 491.

So one who receives from his principal the property of another and afterward returns it to his principal is not guilty of a conversion, even though he may have reason to believe that the principal is not the owner: *Loring v. Mulcahy*, 3 Allen (Mass.), 575; *Wando Phosphate Co. v. Parker*, 93 Ga., 414, 21 S. E., 53; *National Merc. Bk. v. Rymill*, 44 L. T. N. S., 767.

So it is not ordinarily a conversion, where what the agent has done amounts to simply changing the location of the property, but not in any way denying or interfering with the owner's title. *Burditt v. Hunt*, 25 Me., 419, 43 Am. Dec., 289; *Metcalf v. McLaughlin*, 122 Mass., 84; *Gurley v. Armstead*, 148 Mass., 267, 19 N. E., 389, 2 L. R. A., 80; *Archibeque v. Miera*, 1 N. M., 419.

However, where the agent takes goods from the plaintiff and delivers them to a third person under circumstances indicating a denial of the owner's right, the agent may be held liable for the conversion. *Mead v. Jack*, 12 Daly (N. Y.), 65.

⁹ *Singer Mfg. Co. v. King*, 14 R. I., 511.

¹⁰ Citing: *Carroll v. Mix*, 51 Barb. (N. Y.), 212; *Lee v. Bayes*, 18 C. B., 599, 607; *Sheridan v. The New Quay Co.*, 4 C. B. N. S., 618; *Cales v. Wright*, 4 Taunt., 198.

To same effect see *Goodwin v. Wertheimer*, 99 N. Y., 149, 1 N. E., 404; *Mount v. Derick*, 5 Hill (N. Y.), 455; *Arthur v. Balch*, 3 Fost. (N. H.), 157.

ceived the chattel from his master, it has been held that he ought not to give it up without first consulting the master in regard to it.¹¹ But if, after having had an opportunity to confer with his master, he relies on his master's title and absolutely refuses to comply with the demand, he will be liable for a conversion.¹² The mere fact that he refuses for the benefit of his principal will not protect him."¹³

§ 7. AGENT'S LIABILITY FOR FRAUD, MISREPRESENTATION OR DECEIT.—No one can give to another any lawful authority to practice wilful fraud, misrepresentation or deceit upon a third. An agent, therefore, who intentionally defrauds a third person or injures him by wilful misrepresentation or deceit, is personally liable for the injury he inflicts.¹⁴ The principal may or may not be liable also according as he may or may not be deemed to have authorized or approved the wrongful acts. Where, however, the agent acted in good faith and the fraud or deceit was the principal's act alone, the agent would not be liable.¹⁵

In accordance with these principles an agent who fraudulently induces a person to take out an insurance policy is liable to an action for the injury sustained;¹⁶ in such a case the party deceived

¹¹ Citing: *Mires v. Solebay*, 2 Mod., 242, 245; *Alexander v. Southey*, 5 B. & A., 247; *Berry v. Vantries*, 12 Serg. & R., 89.

¹² Citing *Lee v. Robinson*, 25 L. J. C. P., 249, 18 C. B., 599; 1 *Addison on Torts*, §475; *Greenway v. Fisher*, 1 Car. & P., 190; *Stephens v. Elwall*, 4 M. & S., 259; *Perkins v. Smith*, 1 Wils., 328; *Gage v. Whittier*, 17 N. H., 312. To same effect: *Elmore v. Brooks*, 6 Heisk. (Tenn.), 45.

¹³ Citing: *Kimball v. Billings*, 55 Me., 147.

¹⁴ *Hamlin v. Abell*, 120 Mo., 188, 25 S. W., 516; *Reed v. Peterson*, 91 Ill., 288; *Endsley v. Johns*, 120 Ill., 469, 60 Am. Rep., 572; *Moore v. Shields*, 121 Ind., 267, 23 N. E., 89; *Salisbury v. Iddings*, 29 Neb., 736, 46 N. W., 267; *Weber v. Weber*, 47 Mich., 569, 11 N. W., 389; *Starkweather v. Benjamin*, 32 Mich., 306; *Alpha Mills v. Watertown Steam Engine Co.*, 116 N. C., 797, 21 S. E., 917; *Norris v. Kipp*, 74 Ia., 444, 38 N. W., 152; *Eaglesfield v. Londonderry*, L. R. 4 Ch. Div., 693.

¹⁵ Thus in *Cullen v. Thomson*, 4 Mac Q., 424, 439, it is said by Lord Wensleydale: "In some cases a man may innocently assist in a transaction which is a fraud on some one. Of course, such a person cannot be responsible criminally or civilly. Or he may be a partaker in the fraud to a limited extent, as, for instance, in the supposed case adverted to in the course of the argument, the printer of the alleged false statement, who may know it to be false, and yet may not have intended or known sufficiently the fraudulent purpose to which it was meant to be applied, to make him responsible for the injurious consequences of it."

¹⁶ *Hedden v. Griffin*, 136 Mass., 229, 49 Am. Rep., 25.

has two remedies; he may retain the policy and sue for damages, or he may rescind the contract and recover from the agent the premium paid. So an insurance agent who misrepresents material facts to the insured by reason of which the insured loses his claim against the company for a loss sustained, is personally responsible to the insured for the amount.¹⁷ An agent is responsible individually to the purchaser for a fraud committed by him in the sale of property, though he does not profess to sell the property as his own, but acts throughout in his capacity as an agent.¹⁸

As pointed out in the preceding sections, it is entirely immaterial that the agent derived no personal benefit from the wrong done.¹⁹

§ 8. AGENT'S LIABILITY FOR HIS WILFUL OR MALICIOUS ACTS.—An agent or servant is undoubtedly liable for his own wilful or malicious acts. Under rules formerly prevailing and not yet entirely inoperative, holding the principal or master not liable in such a case, there would be no one liable if the agent or servant could not be held. The master or principal is now held liable in many cases of this sort,²⁰ but this additional liability of the principal does not destroy the liability of the agent.²¹

§ 9. AGENT LIABLE TO THIRD PERSONS FOR NEGLIGENT INJURIES COMMITTED BY HIM WHILE ACTING IN PERFORMANCE OF AGENCY.—So if an agent or servant, while acting upon his master's business, so negligently acts as to inflict direct and immediate injury to the person or property of a third person, whether he be one to whom the master owes a special duty or not, under circumstances which would impose liability on the defendant, if he were acting under the same conditions on his own account, he

¹⁷ *Kroeger v. Pitcairn*, 101 Penn. St., 311, 47 Am. Rep., 718.

¹⁸ *Campbell v. Hillman*, 15 B. Mon. (Ky.), 508, 61 Am. Dec., 195.

¹⁹ *Weber v. Weber*, 47 Mich., 569, 11 N. W., 389.

²⁰ See article by present writer in 9 *Michigan Law Review*, 87, 181.

²¹ *Horner v. Lawrence*, 37 N. J. L., 46; *Able v. Southern Ry. Co.*, 73 S. C., 173, 52 S. E., 962; *Schumpert v. Southern Ry.*, 65 S. C., 332, 43 S. E., 813; *Gardner v. Southern Ry. Co. & Pierson*, 65 S. C., 341, 43 S. E., 816; *Holmes v. Wakefield et al.*, 94 Mass. (12 Allen), 580; *Hewett v. Swift*, 85 Mass. (3 Allen), 420.

Many of these were cases in which the question was whether the master and servant could be joined in the same action, but they all concede the liability of the agent.

will be personally liable.²² Thus, if a servant while running upon his master's errand should negligently knock down a by-stander, under circumstances which would make the servant liable if he were running upon his own errand, he would be personally liable. And so if a servant while driving his master's horse, operating his master's machine, or managing or conducting any other property of his principal over which he has control, so drives or manages as to inflict injury upon third persons under circumstances which would render him liable if he were doing the same thing on his own account, he will be personally liable. In such a case the servant or agent is the actor, and the fact that he is acting for a principal is only the occasion or the opportunity for his act, but not its justification. The principal or master might also be liable in such a case, but that would not excuse or exonerate the agent.²³

It is also immaterial that the servant or agent violates a duty he owes to his principal or master at the same time. Thus the servant who, while driving his master's team, negligently crushes the wagon of a third person, is liable to the latter, though he may by the same negligent act crush his master's wagon and be liable to him also.

²² *Humphreys Co. v. Frank*, 46 Colo., 524, 105 Pac., 1093; *Miller v. Staples*, 3 Colo. App., 93, 32 Pac., 81; *Phelps v. Wait*, 30 N. Y., 78; *Hewett v. Swift*, 3 Allen (85 Mass.), 420.

Thus the director of a corporation may be held personally liable for an assault which he orders (*Peck v. Cooper*, 112 Ill., 192, 54 Am. Rep., 231) or in which he participates (*Brokaw v. Railroad Co.*, 32 N. J. L., 328). So of a malicious prosecution: *Hussey v. Norfolk, etc., R. Co.*, 98 N. Car., 34. So directors have been held personally liable for their negligent (*Cameron v. Kenyon Co.*, 22 Mont., 312, 56 Pac., 358, 74 Am. St. R., 602, 44 L. R. A., 508) or wilful conduct in the management of the corporation; *Nunnally v. Iron Co.*, 94 Tenn., 397, 29 S. W., 361, 28 L. R. A., 421; and for the infringement of patents. *National Cash Register Co. v. Leland*, 94 Fed., 502. The president of an incorporated club may be held personally liable for the negligent discharge of fireworks under his direction. *Jenne v. Sutton*, 43 N. J. L., 257.

²³ *Eaglesfield v. Londonderry*, 4 Ch. Div., 693 (per Jessel, M. R.); *Breen v. Field*, 157 Mass., 277, 31 N. E., 1075.

It is true that Blackstone declares that "if a smith's servant lames a horse while he is shoeing him, an action lies against the master, but not against the servant." But, as has often been pointed out, this was probably not true even in Blackstone's time, and is certainly not true to-day.

The case of *Burch v. Caden Stone Co.*, 93 Fed., 181, is apparently contrary to the rule of the text.

§ 10.—The liability of the agent in these cases is not affected by the fact that there is no privity of contract between himself and the person injured. His liability does not depend upon privity, but upon the general duty imposed on every one to so govern his conduct as not to negligently injure another. Many illustrations may be found in the reported cases. A railway engineer who negligently runs his master's engine at a high rate of speed through a populous district would be liable if it were his own engine or if it were an engine which he had hired or borrowed for the occasion, and the case should not be different where it is an engine under his control, because he is in the service of a railroad company.²⁴ If the running at that rate in that place was the result of the specific command of the company, a somewhat different case would be presented, although even then he would not be justified in obeying specific commands in the face of obvious danger.

So a bricklayer who negligently drops a brick upon a passer-by should be personally liable. It is his own act of negligence, in a case in which he owes a duty of care, and the fact that he did it while working for a master does not excuse him.²⁵

For similar reasons, an engineer of a switch engine and a switchman are personally liable for negligently running down another servant of the same company in disregard of signals given them by the person injured;²⁶ and servants of a house-

²⁴ *Southern Ry. Co. v. Grizzle*, 124 Ga., 735, 53 S. E., 244; *Southern Ry. Co. v. Reynolds*, 126 Ga., 657, 55 S. E., 1039; *Able v. Southern Ry. Co.*, 73 S. C., 173, 52 S. E., 962; *Ellis v. Southern Ry. Co.*, 72 S. C., 465, 52 S. E., 228, 2 L. R. A. (N. S.), 378; *Martin v. Louisville & Nashville Ry. Co.*, 95 Ky., 612, 26 S. W., 801; *Illinois Central Ry. Co. v. Coley*, 121 Ky., 385, 28 Ky. L. R., 336, 89 S. W., 234, 1 L. R. A. (N. S.), 370; *Illinois Central Ry. Co. v. Houchins*, 121 Ky., 526, 28 Ky. L. R., 499, 89 S. W., 512, 1 L. R. A. (N. S.), 375.

²⁵ *Mayer v. Thompson-Hutchison Bldg. Co.*, 104 Ala., 611, 16 South., 620, 28 L. R. A., 433, 53 Am. St., 88.

²⁶ *Mayberry v. Northern Pac. Ry. Co.*, 100 Minn., 79, 110 N. W., 356. Compare *Bryce v. Southern Ry. Co.*, 125 Fed., 958.

In *Colgate Co. v. Bross* [Okla.], 107 Pac., 425, it was held that an engineer operating an engine hoisting cars was liable to a fellow-servant for injury caused by negligence in not obeying a signal given by another fellow-servant.

In *Galvin v. Brown & McCable*, 53 Ore., 598, 101 Pac., 671, a general superintendent of a corporation was held liable for negligently ordering five timbers to be carried in a sling, instead of four, on account of which one fell on plaintiff.

mover are liable for their negligent acts in moving a house.²⁷

So where an agent, while acting for his principal, opened a gap in another's fence and left it open, trusting to his own supervision to see that no injury was caused thereby, he was held personally liable for the loss of animals escaping through the opening.²⁸

§ II. AGENT MUST HAVE BEEN AN ACTOR, NOT A MERE AUTOMATON.—It would seem to be a necessary limitation upon the liability of the agent in any case, that he can fairly be deemed to have been an actor in the transaction rather than a mere automaton or mechanical instrumentality. Thus, in a case in which the question was whether two agents, *Bayes & Pennington*, could be held liable for directing a distress for rent to be made in behalf of their principals, the landlords, by one Harrison, another agent, it was said by Baron Bramwell in the Court of Exchequer:²⁹ "It occurred to my brother, Channell, and myself, who, together with my brother Martin, heard this case, that it was doubtful whether, under the circumstances, *Bayes & Pennington* could be liable for the act of Harrison, whether in fact they were anything more than a mere conduit-pipe for communicating authority from the landlords to Harrison. For my own part, and I believe I may say for my brother Channell, if there had been nothing more, we

In *Moyse v. Northern Pac. Ry. Co.* (Mont.), 108 Pac., 1062, defendants, part of yard crew, were held liable for allowing cars to escape and collide with the car in which plaintiff, a conductor, was riding.

²⁷ *Bickford v. Richards*, 154 Mass., 163, 27 N. E., 1014.

²⁸ *Horner v. Lawrence*, 37 N. J. L., 46.

²⁹ *Bennett v. Bayes*, 5 H. & N., 391.

In *Brown v. Lent*, 20 Vt., 529, it is said: "A mere intermediate agent between the master and the direct agent cannot be held constructively responsible for the acts of the latter." Approved but distinguished in *Bileu v. Paisley*, 18 Oreg., 47, 21 Pac., 934, 4 L. R. A., 840.

So in *Hewett v. Swift*, 3 Allen (85 Mass.), 420, it was held that the president of a corporation was not liable where, in his capacity as president and as a "mere conduit for communication between the corporation and the agent" who did the wrong, he transmitted to the latter the orders of the corporation directing the doing of the act.

An intermediate agent like a steward or general manager is not personally liable for the acts of servants hired by him for his principal, and whose act he neither directed, caused or participated in. *Stone v. Cartwright*, 6 Term. Rep. (Durn. & E.), 411; *Bath v. Caton*, 37 Mich., 199.

See also *Nicholson v. Mounsey*, 15 East, 384.

Agent not at fault. Within the same reasoning, the agent cannot be held liable where he had no duty or power in the matter. *Dudley v. Illinois, etc., Ry. Co.*, 127 Ky., 221, 96 S. W., 835, 29 Ky. L. Rep., 1029.

should have continued to entertain great doubt whether they would have been liable. It is certain that a messenger who delivers a letter containing a warrant of distress, not knowing the contents of the letter, is not responsible; and I cannot help thinking that if a servant were sent with this message to a broker, 'My master desires you to distrain for rent due to him,' the servant would not be liable as a person ordering or committing the trespass. So, if a person wrote a letter in these terms, 'My friend, having a bad hand, is unable to write, and he requests me to write and tell you to distrain on his tenant,' it is difficult to say that a person so writing would be liable to an action."

§ 12. AGENT'S LIABILITY FOR NEGLIGENT OMISSIONS.—MISFEASANCE.—NONFEASANCE.—When the question of the agent's liability to third persons for negligent omissions to act is reached, a problem of greater difficulty is presented. The doctrine very early found expression in English law, that while a servant could be personally charged for his active wrong-doing, the responsibility for his negligence rested on his master only. Thus Chief Justice Holt in 1701 declared that "a servant or deputy *quatenus* such cannot be charged for neglect, but the principal only shall be charged for it. But for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or a servant, but as a wrong-doer."³⁰

More than a hundred years before, in an action involving the liability of an under-sheriff, Coke, in arguing in the King's Bench, had said: "I grant that an action for any falsity or deceit, lyeth against the under-sheriff, as for embesseling, rasing of writs, and so forth, but upon nonfeasans, as the case is here, the not return of the summons, it ought to be brought against the sheriff himself."³¹

And in a very much more recent case in Louisiana, the court said:

"At common law, an agent is personally responsible to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done; the agent in the latter case being liable to his principal only. For non-feasance, or mere neglect in the performance of duty, the responsibility therefor must arise from some express or implied

³⁰ In *Lane v. Cotton*, 12 Mod., 472, 488.

³¹ *Marsh v. Astrey*, 1 Leonard, 146.

obligation between particular parties standing in privity of law or contract with each other. No man is bound to answer for such violation of duty or obligation except to those to whom he has become directly bound or amenable for his conduct. * * * An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations toward third persons, other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to perform them. In failing to do so he wrongs no one but his principal, who alone can hold him responsible."³²

§ 13. SAME SUBJECT—CERTAIN RULES QUOTED.—Before attempting to work out any more definite principles certain rules which have been widely quoted may well be noticed. Thus, in one case,³³ before the Supreme Judicial Court of Massachusetts, Chief Justice Gray, later of the Supreme Court of the United States, used the following language: "It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for non-feasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits or neglects to do so, the principal is the only person who can maintain any action against him for the non-feasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing

³² *Delaney v. Rochereau*, 34 La. Ann., 1123, 44 Am. Rep., 456.

So in *Kahl v. Love*, 37 N. J. L., 5, it is said: "It is not everyone who suffers a loss from the negligence of another that can maintain a suit on such a ground. The limit of the doctrine relating to actionable negligence is, that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business, is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies, if the ill effects of the negligence of men could be followed down the chain of results to the final effect. Under such a doctrine, the careless manufacturer of iron might be made responsible for the destruction of a steamer from the bursting of a boiler, into which his imperfect material, after passing through many hands and various transactions, had been converted. To avoid such absurd consequences, the right of suit for such a cause has been circumscribed within the bounds already defined."

³³ *Osborne v. Morgan*, 130 Mass., 102, 39 Am. Rep., 437.

it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not non-feasance or doing nothing, but it is misfeasance, doing improperly."

In another case in the same court,³⁴ in which an agent had been charged with negligence in admitting water into the pipes of a building without first seeing that they were in proper condition, Judge Metcalf said: "Non-feasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all. The defendant's omission to examine the state of the pipes in the house before causing the water to be let on was a non-feasance. But if he had not caused the water to be let on, that non-feasance would not have injured the plaintiff. If he had examined the pipes and left them in a proper condition, and then caused the letting on of the water, there would have been neither non-feasance nor misfeasance. As the facts are, the non-feasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of its being preceded by a non-feasance."

So in the Louisiana case above referred to, it is said: "Every one, whether he is principal or agent, is responsible directly to persons injured by his own negligence, in fulfilling obligations resting upon him in his individual character and which the law imposes upon him independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence, in respect to duties imposed by law upon him in common with all other men. * * * The whole doctrine on that subject culminates in the proposition that wherever the agent's negligence, consisting in his own wrong doing, therefore in an act, directly injures a stranger, then such stranger can recover from the agent damages for the injury."³⁵

³⁴ *Bell v. Josselyn*, 3 Gray (Mass.), 309, 63 Am. Dec., 741.

³⁵ *Bermudez, C. J.*, in *Delaney v. Rochereau*, 34 La. Ann., 1123, 44 Am. Rep., 456.

§ 14. ATTEMPTED DISTINCTION BETWEEN MISFEASANCE AND NON-FEASANCE.—The attempted distinction between misfeasance and non-feasance has been very much criticized and often denied to exist. It is undoubtedly true that the Latin names employed may not be very appropriate or illuminating. Notwithstanding this, however, it is believed to be true that there is a real distinction lying back of these phrases which it is important to discover and which is not more vague or indefinite than many other distinctions which it is necessary in our law to recognize.³⁶

³⁶ In the following cases acts of alleged negligent omission have been dealt with criminally:

Rex v. Friend, Rus. & Ry., 20, where a master was held guilty of a misdemeanor for not providing proper food and clothing for his apprentice, causing loss of health.

Regina v. Lowe, 3 C. & K., 123, where an engineer, employed to run an engine to draw miners out of a coal pit, deserted his post and left an ignorant boy in charge, and a miner was injured. The court held "that a man may, by neglect of duty, render himself liable to be convicted of manslaughter, or even murder."

But in *Regina v. Smith*, 11 Cox C. C., 210, where the servant employed to watch at a crossing, there being no duty on the master to keep a servant there, deserted his post, it was held that the servant was not criminally liable because he owed no duty to the public.

Regina v. Nicholls, 13 Cox C. C., 75, where a grandmother, who was compelled to leave home to work during the day, left an infant of tender years in the care of her nine-year-old son, and the child died from want of food. The court charged that there must be "wicked negligence" or recklessness to make the defendant criminally liable.

In *Regina v. Downes*, 13 Cox C. C., 111, a father from religious motives, neglected to furnish proper medical attention for his son. The court said, "In this case there was a duty imposed by the statute on the prisoner to provide medical aid for his infant child, and there was the deliberate intention not to obey the law; whether proceeding from a good or bad motive is not material."

Regina v. Instan (1893), 1 Q. B., 450, a niece was held criminally liable for failing to provide food and medicine for an aunt, seventy-three years old, with whom the niece lived. "The prisoner," said the court, "was under a moral obligation to the deceased from which arose a legal duty towards her."

In *Rex v. Smith*, 2 C. & P. 449, it was held that a brother was not criminally liable for neglecting to provide food, warmth, etc., for an idiot brother in his house. "There is strong proof that there was some negligence; but my point is, that omission, without a duty, will not create an indictable offense."

For an elaborate discussion of *The Moral Duty to Aid Others as a Basis for Tort Liability*, see articles by F. H. Bohlen, 56 *Univ. of Pa. Law Review*, 217, 316.

It is sometimes said that the only distinction, if one exists, is to be found in the fact that in one case the agent has, while in the other case he has not, actually entered upon the performance of an undertaking which he has assumed for his principal. In the latter case, it is said that if he had never entered upon the performance at all, as he had agreed to do, he is liable to his principal for not performing, but that he will not be liable to third persons, although they may have also suffered injury by reason of his non-performance. In these cases, the agent's duty will often be merely a contractual one and the third persons are not parties to the contract. Even if it be a non-contractual one, it will usually arise out of some act, condition or relation which is personal to the principal and the agent, and therefore will not sustain an action by third persons, who are strangers to it.

§ 15.—This aspect of the matter may be made somewhat clearer by some further distinctions. In the case in hand, it may be, (1) that the principal was under no obligations to the third person; or (2) that the principal had undertaken some duty to the third person which he relied upon the agent to perform. The principal, for example, is party to an action involving a question in which several others are equally but separately interested. The principal has agreed with an attorney that the latter shall argue his case. But the attorney wholly neglects to undertake it. It is conceded that if he had argued it, he would probably have won it. In any event, its determination would have settled the question not only for his own client, but for all the others similarly interested and would have saved the latter the expense and trouble of settling it for themselves. The attorney is liable to his own client for the loss he may have sustained, but no one would suggest that he is liable to the other parties.

The principal is proprietor of a steamboat and has undertaken to carry a company of people across a stream at a certain time. He has engaged a captain to pilot the boat across. At the appointed time the passengers are present, the captain is upon the ground, everything is in readiness, but the captain utterly refuses to go

For the liability, under a statute, for not furnishing sufficient food to a child whose care the defendant had undertaken, see *Cowley v. People*, 83 N. Y., 464, 38 Am. Rep., 464.

For not furnishing medical attendance where the parties believed in "Christian Science," etc., see *People v. Pierson*, 176 N. Y., 201, 68 N. E., 243, 98 Am. St. R., 666; *Westrup v. Commonwealth*, 123 Ky., 95, 93 S. W., 646, 6 L. R. A. (N. S.), 685.

upon the boat or in any respect to enter upon or perform his undertaking. The loss or inconvenience to the assembled passengers may be very great. Can any one of them maintain an action against the captain?

§ 16. FURTHER OF THIS DISTINCTION.—It is said, however, that while the agent may not be liable if he never enters upon his undertaking, yet if he has actually entered upon the performance of his duties he will be liable to third persons who are injured by reason of his failure to exercise reasonable care and diligence in their performance. In this case also some distinctions are possible. Suppose that though the agent owes his principal a duty, yet the principal himself owes no duty to third persons who may sustain loss by reason of the agent's neglect. The principal confides to the charge of his agent certain premises which it is the agent's duty to his principal to keep in good condition and repair; the agent fails to perform this duty, permits the premises to become dilapidated, and disreputable, and he is clearly liable to his principal for the injury he sustains. But is the agent liable to the adjoining proprietors because their premises are rendered less attractive or rentable or saleable or valuable by reason of the condition in which the agent has thus permitted his principal's premises to be, that condition not constituting in law a nuisance? The principal owes no duty to the adjoining proprietors and the agent would owe them no duty if he were himself the principal.

§ 17.—Suppose, next, that the principal is under some obligation to the other party. A principal has contracted with a third person to supply a horse fit for a lady to ride. He instructs his agent to go into the market and buy a horse fit for a lady to ride, but says nothing further to the agent respecting the use to which the horse is to be put. The agent goes into the market and negligently buys a horse unfit for a lady to ride and delivers it to his principal. The principal delivers the horse to the other party in pursuance of the agreement, and the other party—a woman, let us say—is injured while riding the horse as a result of its vicious character. Is the agent liable to her? If the purchaser gives the horse to her daughter, and the daughter is injured, is the agent liable to the daughter? ^{36a}

^{36a} See *Cameron v. Mount*, 86 Wis., 56, N. W., 1094, 22 L. R. A., 512, where the defendant undertook to sell to plaintiff's husband a horse fit for a woman to drive. At defendant's request, the wife drove the horse to try

The principal is the proprietor of a steamboat, as in the case already supposed in a previous illustration. The pilot, instead of refusing to go at all, starts with the passengers for the desired destination. After going part way, however, the pilot turns the boat about, and sets the passengers all down again, safe but angry, at the point from which they started. Is he now liable to them?

The principal again is a carrier of passengers. He has undertaken to exercise at least reasonable care and dispatch to bring a passenger to his destination at a particular time. The principal entrusts the conduct of the vehicle to an agent, who knows the facts. The agent so negligently manages the vehicle that the passenger does not arrive on time, and thereby sustains great loss. May the passenger recover damages from the agent?

§ 18.—A client again, about to buy real estate, submits the abstract of title to his attorney for examination. The attorney examines the abstract and gives to his client a written opinion that the title is good. As a matter of fact, the attorney has negligently failed to observe a defect in the title. The client buys the land and holds it without discovering the defect. He then offers to sell the land to another and exhibits to him the opinion of the attorney concerning the title. The purchaser buys in reliance upon the opinion without making further investigation. The client conveys the land without warranty and never suffers in any way from the defective title. The purchaser, however, does suffer from it. In the absence at least of anything to indicate that the attorney had reason to believe that his opinion would be put to such a use, is he liable to this second purchaser for the injury he sustains?

Without attempting here to answer categorically these and countless other similar questions which will at once occur to the mind, let us see how the rules already laid down by the courts in this connection would apply to certain of them.

§ 19.—In the first place, as has been seen, it is constantly said that there is a radical distinction in the liability of the servant or agent depending upon whether he has or has not entered upon the performance of his undertaking, and it will be worth while to examine this distinction more closely to see what it really contains.

it and, while doing so, was injured because of the vicious character of the horse. *Held*, that she might recover damages from the proposed seller. See also *post* § 26.

It is said by Gray, C. J.,³⁷ in the quotation already given in a preceding section, "that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects so to do, the principal is the only person who can maintain any action against him for the non-feasance." Applying this to the case of the steamboat suggested above, if the servant never starts upon the voyage, his refusal to start as he had agreed with his principal to do, will not render him liable in tort to the expectant passengers. Neither could they have any remedy against him in contract except upon some theory of a contract made for their benefit and enforceable by them.

§ 20.—Chief Justice Gray, however, continues by saying: "But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards." Here are two ideas: (1) Negligence in the performance of his undertaking; and (2) negligently abandoning performance and leaving things in a dangerous condition. Applying these rules to the case of the boat, if the servant starts upon his journey but negligently injures his passengers or third persons by his management of the boat while on the way, he would be personally liable. There is nothing new in this. It is the now familiar rule already referred to which makes the servant or agent liable for direct and immediate injuries caused by his negligence while in the performance of his undertaking.

He is also said to be liable for injuries caused "by abandoning his execution midway and leaving things in a dangerous condition." If, then, in the case of the boat, the servant negligently (*a fortiori* if he does it wilfully) abandons the boat or abandons its management in midstream and thereby causes injury to the passengers, he would be liable to them.

§ 21.—But suppose the servant or agent in the case of the boat does neither of these things, but, as in one of the cases supposed, after taking the boat and the passengers in safety half-way across the stream, he then, against their protests, turns the boat about and puts them down in safety again at the place from which they

³⁷ In *Osborne v. Morgan*, 130 Mass., 102.

started. Is he now liable to them? Unless the liability of the servant in these cases is to be confined to acts of physical injury to person or property, would he not be liable for so *negligently* managing the boat that instead of making his proper destination he makes some other; or even comes around again to the point from whence he started? Or, if he does it wilfully, would he not be liable to passengers rightfully on the boat and rightfully headed toward their destination, if against their will he wilfully turns them about and carries them in the opposite direction? Has he any more right to bring them back to the place from which they started than to take them to some other destination than that originally agreed upon?

§ 22. AGENT LIABLE FOR CONDITION OF PREMISES OVER WHICH HE HAS CONTROL.—On analogy to cases already considered, the agent should be held responsible for injuries caused by the condition of premises in the possession or under the control of the agent where the condition is one for which he is responsible and the injury is such as he would be liable for if he were controlling the premises on his own account. Thus, if an agent, having control of premises, should permit or maintain a nuisance thereon for which he would be liable if he were the principal in the transaction, he should be equally liable notwithstanding the fact that he is but an agent.

For similar reasons, the agent should be held responsible for injuries caused by his neglect to keep in repair premises under his control where he is charged by his principal with the duty to repair and has the necessary means, in any case in which he would be liable for the same injury if he were controlling the premises on his own account. In these cases in which the agent has both the duty (to his principal) and the power to repair, and fails to do so, the injury can fairly be regarded as the consequence of his own act.³⁸ If an agent would be responsible for negligently driv-

³⁸ *Cases Holding Agent Not Liable*.—The case most frequently cited and perhaps most thoroughly considered in which the agent was held not liable is *Delaney v. Rochereau*, 34 La. Ann., 1123, 44 Am. Rep., 456.

This was an action to charge defendants with liability for an injury resulting from the defective condition of premises, for the owner of which they were rental agents. The owner of the premises resided in France, the premises were a two-story building in New Orleans; the defendants were agents of the owner, "having control as such of the property." Half of the building was rented and half vacant. A balcony extended along the front of the entire building and needed repair, as the defendants knew. *But there is nothing in the case to show that they had as to their*

ing his principal's team against a third person, as he would undoubtedly be, is he any the less responsible because he negligently fails to guide the team or negligently permits it to go unguided or negligently leaves it unattended and injury thereby results? If the agent is not in control or has neither the duty nor the power to repair, the failure to repair cannot be regarded as his act. But where these conditions are present it is difficult to see why it is not properly to be regarded as his act. It is, of course, in one sense a not-doing, a non-feasance; but his act of control is a doing, a feasance, and his failure to properly control is a misfeasance, if any importance is to be attached to these terms. It would seem to need no argument to show that the mere not-doing

principal either any duty or any authority to repair or any money with which to pay for repairs. On two or more occasions defendants had permitted the vacant half to be used for purposes of amusement. On the night in question, a dance was given in the vacant portion of the building, without the knowledge or consent of the defendants, by a person who had obtained the key from a neighbor, and taken possession of the premises. During the evening twelve or thirteen of the dancers rushed out upon the balcony, which gave way under them, and they were thrown to the ground. One of them, a boy about fourteen years of age, was killed by the fall. His parents brought this action against the agents. It was held that the agents were not liable. The case was very fully considered with reference to the English, Roman and French law. Some quotations from the opinion have already been made in the text. The gist of the conclusion is found in the following extract:

"An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations towards third persons other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to perform them. In failing to do so, he wrongs no one but his principal, who alone can hold him responsible."

It is not at all clear that the facts of this case bring it within the rule of the text. If they do, the answer which it is submitted may be made to the argument of the court, is that the duty is one not merely imposed upon the defendants *as agents* by their contracts with their principals, but imposed upon them by law as individuals having control of property not to so control it as to cause injury to third persons.

To same effect as the principal case, is, *Carey v. Rochereau*, 16 Fed., 87.

Another case frequently cited is that of *Feltus v. Swan*, 62 Miss., 415, wherein the principal and agent were sued together to recover damages for not keeping open a drain upon land adjoining the plaintiff's, and alleged in the declaration to have been under the charge and control of the defendants, one as owner thereof and the other as manager and agent thereof. Nothing is alleged to show that the agent had any actual control of the premises or any power or duty in the matter. It was held

of a particular act which is in itself but a mere incident in the larger act of doing, ought not to be regarded as such a non-feasance as will excuse the agent within any proper meaning of that term.

Not all the cases, it is true, are in harmony with the rules above laid down, but these rules are believed to be sound, and to be sustained by the weight of modern authority.

It is, of course, essential to the liability of the agent in these cases, that he shall be responsible for the condition. If the premises were in the defective condition when they came under his charge, and he has neither the power nor the authority to

that the agent was not liable and under the allegations of the declaration the conclusion would seem to be sound.

In *Dean v. Brock*, 11 Ind. App., 507, 38 N. E., 829, the action was brought against both principals and agents but the principals did not appear and seem not to have been served with process. It was alleged in the complaint that the agents were employed to rent the building, collect the rents, pay the taxes and make the necessary repairs to keep the building in a tenantable condition. Plaintiff was injured, as he alleged, because of the rotten condition of certain sills which had not been examined or repaired for more than twenty years, as the agents knew, as he also alleged, and he charged the agents with negligence in not knowing the condition and in not making repairs. It was held that the agents were not liable on the ground that their neglect, if there was any, was mere non-feasance.

It would be possible to make some distinctions with reference to this case, but it undoubtedly proceeds upon a theory which cannot be reconciled with the rule laid down in the text.

The same conclusions were reached in the similar case of *Drake v. Hagan*, 108 Tenn., 265, 67 S. W., 470, where the doctrine of *Delaney v. Rochereau*, *supra*, is approved.

In *Kuhnert v. Angell*, 10 N. D., 59, 84 N. W., 579, it was held that the agent had not such control as to make him liable.

In *Laboadie v. Hawley*, 61 Tex., 177, 48 Am. Rep., 278, an agent was held not liable to an adjoining proprietor for an injury sustained by him by reason of excessive heat and smoke caused by hot fires in a cooking range which the agent had permitted the tenant to erect in his principal's building. The case is put upon the ground that in any event it was a mere non-feasance, but it does not appear that the agent had any real control over the premises, nor that it was negligent to permit the range to be erected, nor that there was any negligence in its construction. The injury arose from the manner in which the tenant used the range.

See *Scheller v. Silbermintz*, 50 N. Y. Misc., 175.

Cases Holding the Agent Liable.—The following cases hold the agent liable where he had the control and the power and the duty to make the repairs:

Baird v. Shipman, 132 Ill., 16, 23 N. E., 384, 22 Am. St., 504, 7 L. R. A., 128, where agents for a non-resident owner, with general power to lease

change them, or if the defect arose while they were in his charge, but he had no power or authority to correct it, he could ordinarily not be held responsible. Thus, where an agent who was carrying on a mill was charged with responsibility for injuries caused by maintaining the dam at too high a level, but it appeared that the dam was erected at that height long before he became agent and

and make repairs, were held liable for negligently allowing a stable door to get into a dangerous condition so that an expressman delivering goods to the tenant was injured.

Carson v. Quinn, 127 Mo. App., 525, 105 S. W., 1088, where the agent with general control over the premises, a flat building, constructed a new walk in the court and left a hole uncovered.

Ellis v. McNaughton, 76 Mich., 237, 42 N. W., 1113, 15 Am. St., 308, where the agent had general oversight over the erection of a building. One of the workmen, against the agent's orders, removed a part of the sidewalk, but the agent, after knowledge of its removal, allowed it to so remain for some time until the injury.

Bannigan v. Woodbury, 158 Mich., 206, 122 N. W., 531, where plaintiff was injured while passing along the street, by glass falling from window of building over which defendant had control to rent.

Lough v. Davis, 30 Wash., 204, 70 Pac., 491, 59 L. R. A., 802, 94 Am. St., 848; same case, 35 Wash., 449, 77 Pac., 732. Here the agent was authorized to rent, repair and manage. Railing around veranda was allowed to become old and rotten.

In *Campbell v. Portland Sugar Co.*, 62 Me., 552, 16 Am. Rep., 503, plaintiff was injured by falling through a hole in a wharf. The court said: "The general agents who had the care of this wharf and who had agreed with the lessees to make all needful repairs, are certainly in no better position than their principal."

In *Stiewel v. Borman*, 63 Ark., 30, 37 S. W., 404, it was held that the mere fact that defendant was operating a mine as agent did not make him liable for injury caused by the collection of gas, unless it appeared that he had a duty and power to do what was necessary.

In *Carter v. Atlantic Coast Line R. Co.*, 84 S. Car., 546, 66 S. E., 997, it was held that a railroad section boss was liable for allowing weeds to accumulate on the right-of-way, where they caught fire and burned plaintiff's house.

In *Orcutt v. Century Bldg. Co.*, 201 Mo., 424, 99 S. W., 1062, the defendant was a trustee under a deed of trust with power to rent, collect rent, pay taxes, and all expenses in connection with the maintenance, repair and management of an office building. An elevator was allowed to become out of repair.

In *Hagerty v. Montana Ore Purchasing Co.*, 38 Mont., 69, 98 Pac., 643, the agent, a general manager of the mine, allowed a shaft to become defective.

Applying the same principles: *Mayer v. Thompson-Hutchinson Bldg. Co.*, 104 Ala., 611, 16 So., 620, 28 L. R. A., 433, 53 Am. St. Rep., 88; *Greenberg v. Whitcomb Lumb. Co.*, 90 Wis., 225, 63 N. W., 93, 48 Am. St., 911, 28 L. R. A., 439; *Ferrier v. Trepannier*, 24 Can. S. C., 86.

he had no power or authority to change it, it was held that he was not liable.³⁹

§ 23. SAME SUBJECT—OTHER CASES INVOLVING THE SAME PRINCIPLE.—Many other cases involving the same principle as that referred to in the preceding section may be determined in the same way. Thus, an agent having complete charge and control of building operations owes a duty not only to his principal to see that the work is properly done, but also to third persons to see to it that while doing it and with reference to matters over which he has complete control, he does not negligently injure them, whether it be by his direct act or by his failure to take the precautions, without which he ought not to act at all.⁴⁰

So the managing agent of a lumber company having full charge and control of its mill and machinery and of assigning employees to work at various machines, is personally liable for an injury caused by setting an inexperienced and ignorant employee at work upon a dangerous machine.⁴¹

So an agent having complete control and management of a mine with power and authority to do whatever is reasonably necessary to prevent injury from its operation is personally responsible for an injury caused by his neglect to take necessary precautions against the accumulation of dangerous gas therein.⁴²

³⁹ *Brown Paper Co. v. Dean*, 123 Mass., 267. Where a master having an unsafe and insufficient dam across a stream of water ordered his servant to shut the gate and keep it shut until ordered to raise it, and the servant obeyed the order, by means of which the water was raised so high that the dam broke away, and an injury was done to a third person, it was held that the servant was not liable. *Hill v. Caverly*, 7 N. H., 215, 26 Am. Dec., 735.

⁴⁰ *Mayer v. Thompson-Hutchison Bldg. Co.*, 104 Ala., 611, 16 South., 620, 28 L. R. A., 433, 53 Am. St., 88. To same effect, *Lottman v. Barnett*, 62 Mo., 159; *Harriman v. Stowe*, 57 Mo., 93; *Lee v. Dodd*, 20 Mo. App., 271.

But see *Steinhauser v. Spraul*, 127 Mo., 541, 28 S. W., 620, 27 L. R. A., 441, in which the doctrine of non-liability for alleged non-feasance is carried to the extreme.

See also *Ellis v. Southern Ry. Co.*, 72 S. C., 465, 52 S. E., 228, 2 L. R. A. (N. S.), 378; *Fort v. Whipple*, 11 Hun. (N. Y.), 586.

⁴¹ *Greenberg v. Whitcomb Lumb. Co.*, 90 Wis., 225, 63 N. W., 93, 48 Am. St., 911, 28 L. R. A., 439. Compare *O'Neil v. Young*, 58 Mo. App., 628.

⁴² *Stilwell v. Borman*, 63 Ark., 30, 37 S. W., 404. To same effect, see *Hindson v. Markle*, 171 Pa. St., 138, 33 Atl., 74.

So an agent who takes complete charge and control of an office building, employing, supervising and discharging the necessary servants, and controlling and directing the operation of the elevators in the building, is personally liable for injury caused by the careless supervision and management of the elevator by an employee whom he has placed in charge thereof.⁴³

An agent who has personal charge and control of a building which he rents for his principal is personally liable to a tenant for injuries caused to his goods because the agent, after the water had been shut off from the building for a time, caused it to be turned on again without seeing that pipes and faucets were in proper condition.⁴⁴

The managing directors of a corporation are personally responsible for loss caused to a third person because they negligently permitted an undue quantity of high explosives to be accumulated upon the premises under their control.⁴⁵

There are, of course, courts, notably those in New York,⁴⁶ which

⁴³ *Orcutt v. Century Bldg. Co.*, 201 Mo., 424, 99 S. W., 1062.

⁴⁴ *Bell v. Josselyn*, 3 Gray (Mass.), 309, 63 Am. Dec., 741.

⁴⁵ *Cameron v. Kenyon-Connell Com. Co.*, 22 Mont., 312, 56 Pac., 358, 74 Am. St. Rep., 602, 44 L. R. A., 508.

To same effect, *Nunnally v. Southern Iron Co.*, 94 Tenn., 397, 29 S. W., 361, 28 L. R. A., 421.

The president of an incorporated omnibus line directed its drivers to exclude colored persons. He was held individually liable for an injury caused by a driver in obeying such order, and he was not exonerated from such liability because the corporation might also have been liable. *Peck v. Cooper*, 112 Ill., 192, 54 Am. Rep., 231.

But compare *Bullock v. Gaffigan*, 100 Pa., 276.

In *Brower v. Northern Pacific Ry. Co.*, 109 Minn., 385, 124 N. W., 10, an engineer, charged with the duty of keeping a water gauge in repair, negligently put in a gauge and also negligently failed to put the usual guard around the gauge. Plaintiff was injured by an explosion. *Held*, The engineer was liable. The negligent putting in of the gauge was misfeasance, even if the leaving off the guard was mere non-feasance. "The distinction between misfeasance and non-feasance is sometimes fanciful."

Agent Having no Power to Correct Defect.—The doctrine of the foregoing cases, of course, cannot apply where, however great the defect, the agent sought to be held was without duty, power or means to correct it. *Dudley v. Illinois, etc., Ry. Co.*, 127 Ky., 221, 96 S. W., 835, 29 Ky. L. Rep., 1029.

⁴⁶ Thus in *Murray v. Usher*, 117 N. Y., 542, 23 N. E., 564, it was held that the general manager of a saw mill was not personally liable to an employee injured by reason of defective equipment which it was within the power and the duty of the manager to keep in safe condition.

would probably regard these cases as cases of non-feasance merely, and therefore as imposing no liability upon the agent directly to third persons. But the weight of authority is clearly the other way.

§ 24. SAME SUBJECT—CASES IN WHICH AGENT HELD NOT LIABLE.—On the other hand, there are a number of cases, usually called cases of non-feasance, and some of which probably were really such, in which the agent was held not liable. Thus it has been held, that the agent is not liable to a third person for the breach of his duty to his principal to give the latter notice of information coming to his attention and which a third person was interested in having communicated to the principal.⁴⁷

So it is held that the transfer agent of a corporation is not responsible to a third person for refusing to permit him to make a transfer of stock upon the transfer books of the corporation in

The same principles were applied in *Van Antwerp v. Linton*, 89 Hun. (N. Y.), 417, 35 N. Y. Supp., 318, affirmed by the court of appeals on the opinion below, in 157 N. Y., 716, 53 N. E., 1133.

In *Potter v. Gilbert*, 130 App. Div., 632, 115 N. Y. Supp., 425, where an architect owed the contractual duty to the owner to see that the contractor complied with the plans and plaintiff, a servant of the contractor, was injured by the falling of a wall defectively constructed, the architect was held not liable, it not being contended that the plans themselves were negligently drawn.

See also *Henshaw v. Noble*, 7 Ohio St., 226.

⁴⁷ In *Reid v. Humber*, 49 Ga., 207, the court said: "A party shipped his cotton to his factor; he then told the agent of that factor, who was at another depot from where the cotton was shipped, that he did not wish the cotton sold until further orders. Was there a legal obligation on that agent towards the shipper to transmit his directions to the factor? From what did it spring? The agent was bound to his principal, and would have been responsible to him for any damages recovered against the principal, on account of the agent's failure. And the shipper may have been entitled to recover against the principal, either for the neglect of the agent in not forwarding the instructions, or for the violation of them by the principal, if they had been communicated. But we cannot see that there was any such relation between the agent and the shipper as to render the agent liable to him for the neglect. Had the shipper made the agent his own agent in the matter for a consideration, the case would be different."

If the agent of the owner of land takes up stock for trespassing on his principal's property, and if while impounded they are in the possession and under the control of the principal, and are damaged by the failure of the principal to give them proper care and attention, the agent is not responsible for the injury thus caused. *Kimbrough v. Boswell*, 119 Ga., 201, 45 S. E., 977.

the custody of the agent. The remedy, it was said, was by an action against the corporation itself.⁴⁸

For similar reasons it has been held that the treasurer of a corporation is not liable in his individual capacity to a stockholder for refusing to pay him a dividend.⁴⁹

So it is held that a depositor cannot maintain an action against the cashier of a bank for the misapplication of funds, but the action must be against the bank itself.⁵⁰

And, generally, it is held that no action at law can be maintained by stockholders in a corporation against the directors personally to recover for losses sustained by reason of the misconduct of the directors. The directors do not owe the proper performance of their duties as such directly to the stockholders.⁵¹

§ 25.—So in the case of persons employed in a professional capacity. The duties which they owe are ordinarily held to be owing to their immediate employers only, and not to third persons, even though the latter may in some way sustain injury because this duty is not performed. Thus, in a case often referred to, it was held that an attorney at law was not liable to a third person who had relied upon an opinion of title negligently erroneous, which the attorney had given to his client.⁵² In another the attorney of a testator was held not liable to a donee under the will for so negligently drafting the will that it did not secure to the

⁴⁸ *Denny v. Manhattan Co.*, 2 Denio (N. Y.), 115, 5 id. 639.

⁴⁹ *French v. Fuller*, 23 Pick. (Mass.), 108.

⁵⁰ *Wilson v. Rogers*, 1 Wyo., 51.

⁵¹ See *Smith v. Hurd*, 12 Metc. (Mass.), 371, 46 Am. Dec., 690; *Niles v. New York, etc., R. Co.*, 176 N. Y., 119, 68 N. E., 142, and many other cases to be found in the books on Corporations.

⁵² *National Savings Bk. v. Ward*, 100 U. S., 195.

It is easy, however, to imagine circumstances under which a different rule would be applicable; as, for example, where the attorney knew or ought to have known, that the opinion which he rendered was to be relied upon by such persons as the plaintiff. Thus in this case, it was said by Waite, C. J., with whom Swayne and Bradley, JJ., concurred, and who thought that the facts in the case brought it within the rule: "I think if a lawyer, employed to examine and certify to the recorded title of real property, gives his client a certificate which he knows or ought to know is to be used by the client in some business transaction with another person as evidence of the facts certified to, he is liable to such other person relying on his certificate for any loss resulting from his failure to find on record a conveyance affecting the title, which by the use of ordinary professional care and skill he might have found."

donee the benefits which the testator intended to give him.⁵³ The same question has also arisen a number of times with reference to the makers of abstracts of title; and while in general the abstractor has not been held liable to anyone except his immediate employer, special circumstances have in several cases been held to be sufficient to extend his liability, as was suggested in the note respecting the attorney.⁵⁴

⁵³ *Buckley v. Gray*, 110 Cal., 339, 42 Pac., 900, 52 Am. St. R., 88.

⁵⁴ In *Day v. Reynolds*, 23 Hun. (30 N. Y. Sup., Ct.), 131, plaintiff, on being applied to for a loan to be secured by a mortgage, requested the borrower to procure a search from the county clerk's office. The search was gotten from defendant, the county clerk, paid for by the borrower, without knowledge of the purpose for which it was to be used. *Held*, the defendant owed the plaintiff no duty in the matter and so is not liable for failing to note a recorded conveyance by the borrower to a third person.

In *Talpey v. Wright*, 61 Ark., 275, 32 S. W., 1072, 54 Am. St. Rep., 206, it was held that an indorsee of notes secured by a deed of trust could not maintain an action against the abstractor for negligently preparing an abstract for the borrower and lender.

Houseman v. Girard Mutual B. & L. Assn., 81 Pa., 256, to same effect (*semble*).

In *Schade v. Gehner*, 133 Mo., 252, 34 S. W., 576, the plaintiff was the devisee of her husband whom defendant had undertaken to assist in examining the title to land to be purchased. The court said: "Conceding the defendant's negligence . . . That a right of action could not accrue to anyone else who was not privy to the contract, although damage may have resulted to such person by reason of the negligence, is the uniform doctrine of the authorities."

In *Zweigardt v. Birdseye*, 57 Mo. App., 462, it was held that the purchaser had no cause of action against the abstractor for negligently preparing an abstract for the seller.

In *Mallory v. Ferguson*, 50 Kan., 685, 32 Pac., 410, the court said: "We think the great weight of authority is to the effect that the party making the examination and certificate is liable only to his employer and never to a stranger or third party."

In *Mechanics Bldg. Assn. v. Whitacre*, 92 Ind., 547, speaking of the liability of a register who makes a search and certifies to a title, the court said, "he would be liable to the party who employed him, but not to such as might simply see and rely upon such certificate."

In *Morano v. Shaw*, 23 La. Ann., 379, it was held that the vendee of a purchaser at sheriff's sale has no right of action against the recorder of mortgages for having given an imperfect certificate whereby his vendor was induced to purchase.

The same thing was held in *Smith v. Moore*, 9 Rob. (La.), 65.

In *Brown v. Sims*, 22 Ind. App., 317, 53 N. E., 779, 72 Am. St. Rep., 308, the abstractor was informed that the abstract was to be used to induce plaintiff to make a loan, and before the loan was made the abstractor

§ 26.—With reference to certain of the cases here under consideration, it may well be that a ground for the agent's or servant's liability to third persons may be found in the rule which has been invoked to make liable a manufacturer of goods, dangerous inherently or dangerous through negligent manufacture, to a remote purchaser and user, even though no contractual relation between the parties exists. The agent or servant might be liable with his employer, and no reason is apparent why, in many cases, the agent or servant who is really at fault should not be held liable, though no case is now in mind in which this has been attempted.

§ 27. AGENT NOT LIABLE IN TORT TO THIRD PERSONS FOR BREACH OF PRINCIPAL'S CONTRACTS WITH THEM.—An agent is not usually liable to third persons for the breach of his principal's contracts with such third persons even though the performance of those contracts was confided to the agent by the principal. The agent clearly is not liable on the contract, nor can he ordinarily be liable to the third party in tort for the breach of the contract.

Whether upon an analogy to the rule which gives an action against a third person in certain cases for *inducing* the breach of a contract,⁵⁵ an action in tort might be maintained against an agent who wilfully *disables* his principal from performing by with-

told plaintiff in person that the title was clear and that he might rely on the abstract. The court said, "Where the abstracter has no knowledge that some person other than his employer will rely in a pecuniary transaction upon the correctness of the abstract, the general rule that his duty extends only to his employer must be maintained." But *held*: "We think it cannot properly be said that the appellee did not owe a duty to the appellant arising under the contract, the attending circumstances indicating that it was the understanding of all the parties that the service was to be rendered for the use and benefit of the appellant. . . ."

In *Dickle v. Abstract Co.*, 89 Tenn., 431, 14 S. W., 896, 24 Am. St. Rep., 616, it was held that the abstract company was liable to a purchaser for negligence in furnishing an abstract to the seller. The deed was drawn up by the abstract company. The court said: "The allegations of the bill clearly make a privity of contract between the purchasers and the defendant."

See *Siewers v. Commonwealth*, 87 Pa., 15.

In *Peabody B. & L. Assn. v. Houseman*, 89 Pa., 261, 33 Am. St. Rep., 757, the defendant left certain mortgages off the search on promise by the borrower that they would be paid and "the defendant's search clerk knew when he issued the searches that the plaintiffs were about to loan money on the faith of them." Defendant held liable.

⁵⁵ See discussion in YALE LAW JOURNAL for November, 1910. 20 YALE L. JOUR., 69.

holding his own performance, seems nowhere to have received much attention.

The moral considerations may often be stronger in the latter case than in the former. As a "short cut" to the party really at fault, such an action would have some justification. There is, however, less need for giving a new action here than in the former case. There, there is no remedy against the party at fault unless it be one in tort; here, there is always the contractual remedy of the third person against the principal, and of the latter against the agent.

§ 28. LIABILITY OF SERVANT OR AGENT TO FELLOW SERVANT OR AGENT.—Where, under the rules herein laid down, an agent or servant would be liable to a third person for his negligence, he will ordinarily be equally liable although the person injured be another agent or servant in the employment of the same principal or master, and even though, under the so-called fellow-servant doctrine, the principal or master would not be liable.⁵⁶

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⁵⁶ *Osborne v. Morgan*, 130 Mass., 102, 39 Am. Rep., 437 (overruling *Albro v. Jacquith*, 4 Gray (Mass.), 99, 64 Am. Dec., 56); *Rogers v. Overton*, 87 Ind., 410; *Hinds v. Overacker*, 66 Ind., 547, 32 Am. Rep., 114; *Hinds v. Harbou*, 58 Ind., 121; *Hare v. McIntire*, 82 Me., 240, 19 Atl., 453; 8 L. R. A., 450; *Griffiths v. Wolfram*, 22 Minn., 185; *Wright v. Roxburgh*, 2 Ct. Sess. Cases, 3rd Ser., 748; *Brower v. Northern Pacific Ry. Co.*, 109 Minn., 385, 124 N. W., 10.

Contra: *Southcote v. Stanley* (*dictum*), 25 L. J. Exch., 339.